Kumagai Gumi Co Ltd v Zenecon-Kumagai Sdn Bhd & Ors and another application

HIGH COURT (KUALA LUMPUR) — ORIGINATING PETITION NO D3-26-13-1991 AND COMPANIES (WINDING-UP) NO D6-28-84-1992
ANUAR J
1 APRIL 1994

Companies and Corporations — *Winding up — Bona fide dispute to existence of debt based on substantial ground — Whether petition should be dismissed*

Companies and Corporations — *Winding up — Just and equitable ground — Oppression — Relief refused if real purpose of petitioner was to obtain payment owed by company*

Companies and Corporations — *Winding up — Locus standi — Petition presented by fully paid-up shareholder — Whether shown that there would be surplus available for distribution amongst shareholders after payment of company's debts*

Companies and Corporations — *Winding up — Oppression on minority shareholders — What constitutes oppression — Consideration of extrinsic evidence — Companies Act 1965 ss 218 & 181 — Evidence Act 1950 s 92*

Civil Procedure — *Cross-examination — Matter adjudged on affidavit evidence — Whether court has discretion to order cross-examination of parties — Approach which court should take*

Civil Procedure — *Cross-petition — Whether court may entertain such an application — Rules of the High Court 1980 O 92 r 4*

Public Authorities — *Transaction misled public authority — Whether party should have benefit of transaction*

Zenecon-Kumagai Sdn Bhd ('the first respondent') was incorporated as a joint venture between Kumagai Gumi Co Ltd ('the petitioner') and Zenecon Sdn Bhd ('the second respondent'), on 9 October 1984. The third and fourth respondents were the original subscribing shareholders of the company. Later, 490,000 shares were issued to the petitioner and 510,000 shares were issued to the second respondent. On 18 July 1989, a formal shareholders' agreement was entered into between the petitioner and the second, third and fourth respondents, whereby the management control of the first respondent was transferred from the relevant respondents to the petitioner.

Prior to the shareholders' agreement, it was alleged by the respondents that the petitioner had represented and undertaken that in consideration of the change of control, the petitioner would inject funds into the first respondent. The petitioner denied ever giving such an undertaking. It was common ground that after the petitioner took over control of the first respondent's management, no funds were injected into the first respondent.

On 2 May 1991, the petitioner filed an oppression petition and obtained several orders in the nature of injunctions. After filing the petition, there was some correspondence between the two parties and the letters show that an agreement had been reached that the oppression petition would be withdrawn. However, this fell through on 19 June 1991, when the respondents took out an application to discharge the orders. The petitioner then presented the winding-up petition on 4 March 1992 and on 25 June 1992, obtained an order that the two petitions be heard together.

Held, dismissing both the petitions:

(1) Whether cross-examination should be ordered in a matter like this was within the discretion of the court and in this case, the approach of the court should be to examine the contemporaneous documents and the conduct of the parties. Here, the matter could be decided without reference to any cross-examination since there was abundant documentary evidence that was not disputed which would enable any court to arrive at a decision on the matter.

(2) Where a fully paid-up shareholder presents a petition to wind up the company, he must both allege in his petition and show by evidence that there are assets of the company of such an amount that in the event of a winding-up, he would have a tangible share of the surplus to receive. If this is not done, the petition is liable to fail in limine. Here, there was no allegation in the winding-up petition that there would be a surplus available for distribution among the shareholders and there was also no evidence in support of such a contention. Therefore, the petitioner had no locus standi to present the winding-up petition and on this ground alone, the winding-up petition was dismissed.

(3) There exists a bona fide dispute as to the existence of the debt, owed by the company to the petitioner, based on substantial grounds. Therefore, the winding-up petition should be dismissed.

(4) Where oppression is alleged, then whether it be a case heard on s 181 or on the just and equitable provision, the considerations are more or less the same. The court must, in either case, consider the background and all the circumstances of the case, including the relationship between the parties and their conduct towards each other when coming to a decision. Consequently, cases decided under the law of contract that deal with the admissibility of extrinsic evidence, when construing the terms of a written document, are not applicable when considering a case based on a relationship between parties that is governed by considerations of fairness and justice.

(5) On a balance of probabilities, the petitioner did give the undertaking to inject funds into the first respondent. Therefore, the petitioner acted in breach of its undertaking and which was

A a serious matter as the obligation itself was fundamental in nature.

(6) On a balance of probabilities, the basis on which the petition had been presented was material occasioned by the petitioner's own misconduct. If the petitioner had kept its word and acted in accordance with the undertaking to inject funds into the first respondent, the matters complained of would not have occurred.

(7) Considering the case as a whole, the petitioner had not only failed to make out a case of oppression but was in fact the true oppressor. Therefore, the petitioner was not entitled to an order for winding up due to his misconduct. Accordingly, the petitioner was ordered to sell its shares to the second, third and fourth respondents and the respondents were ordered to purchase the petitioner's shares at a price to be determined on an inquiry.

(8) A party should not be entitled to have the benefit of any transaction whereby a public authority had been misled.

(9) The lack of candour or frankness may, in certain circumstances, constitute oppression. In this case, the petitioner acted without frankness or candour and such conduct constituted oppression.

(10) The Rules of the High Court 1980 ('the RHC') do not contain any specific provisions for the presentation or prosecution of a cross-petition but that did not prohibit the court from entertaining such an application. There is nothing in the RHC prohibiting the presentation of a cross-petition. A code of civil procedure cannot foresee and provide for every eventuality. Where it does not, O 92 r 4 of the RHC may be invoked to prevent injustice.

Obiter:

(1) Where a matter is being adjudged on affidavit evidence, a mere assertion without more will not make the issue raised triable viva voce evidence. The duty of a judge does not end as soon as a fact is asserted by any one party and denied or disputed by the other in an affidavit.

(2) Even if the directors or majority shareholders of a company had been guilty of improper or unreasonable conduct so that there appeared to be a prima facie case for relief on just and equitable ground, such relief would nevertheless be refused if the real purpose of the petitioners was to obtain payment owed by the company.

[Bahasa Malaysia summary

Zenecon-Kumagai Sdn Bhd ('responden pertama') telah diperbadankan sebagai suatu usaha sama di antara Kumagai Gumi Co Ltd ('pempetisyen') dan Zenecon Sdn Bhd ('responden kedua'), pada 9 Oktober 1984. Responden ketiga dan keempat merupakan pemegang saham asal syarikat itu. Kemudiannya, 490,000 saham telah dikeluarkan kepada pempetisyen dan 510,000 saham telah

dikeluarkan kepada responden kedua. Pada 18 Julai 1989, suatu perjanjian rasmi telah diikat di antara pempetisyen dan responden kedua, ketiga dan keempat, di mana kuasa pengurusan responden pertama telah dipindahkan daripada responden yang relevan kepada pempetisyen. A

Sebelum perjanjian pemegang saham itu diikat, responden telah mengatakan bahawa pempetisyen telah membuat representasi dan telah berakujanji bahawa sebagai balasan untuk pemindahan kuasa itu, pempetisyen akan menyuntikkan wang ke dalam responden pertama. Pempetisyen telah menafikan bahawa mereka pernah memberi akujanji sedemikian. Adalah merupakan titik persamaan bahawa selepas pempetisyen mengambil alih pengurusan responden pertama, wang tidak disuntikkan ke dalam responden pertama. B C

Pada 2 Mei 1991, pempetisyen telah memfailkan suatu petisyen penindasan dan telah memperolehi beberapa perintah dalam bentuk injunksi. Selepas memfailkan petisyen itu, terdapat surat-menyurat di antara kedua-dua pihak dan surat-surat itu telah menunjukkan bahawa suatu perjanjian telah dicapai bahawa petisyen penindasan itu akan ditarik balik. Akan tetapi, ini telah gagal pada 19 Jun 1991, apabila responden membuat suatu permohonan untuk melepaskan perintah itu. Pempetisyen kemudiannya telah mengemukakan suatu petisyen penggulungan pada 4 Mac 1992 dan pada 25 Jun 1992, mereka telah memperolehi suatu perintah supaya kedua-dua petisyen itu didengar bersama. D E

Diputuskan, menolak kedua-dua petisyen itu:

(1) Sama ada suatu pemeriksaan balas akan diperintahkan di dalam perkara sedemikian adalah di dalam budi bicara mahkamah dan di dalam kes ini, pendekatan yang sepatutnya diambil oleh mahkamah adalah dengan mengkaji dokumen semasa dan kelakuan pihak-pihak. Di sini, perkara ini boleh diputuskan tanpa merujuk kepada sebarang pemeriksaan balas kerana terdapat bukti dokumentari yang amat banyak yang tidak dipertikaikan yang akan membenarkan mahkamah mencapai keputusan mengenai perkara itu. F G

(2) Apabila seseorang pemegang saham yang telah dibayar sepenuhnya membentangkan suatu petisyen untuk menggulung syarikat itu, beliau mesti mengatakan di dalam petisyennya dan juga menunjukkan bukti bahawa jika berlaku suatu penggulungan, terdapat aset syarikat itu yang berlebihan selepas pembayaran hutang syarikat itu, dan beliau akan mendapat sebahagian yang ketara daripada kelebihan itu. Jika ini tidak dilakukan, petisyen itu akan gagal in limine. Di sini, tidak terdapat pengataan di dalam petisyen penggulungan bahawa akan terdapat suatu kelebihan untuk dibahagikan di antara pemegang saham dan juga tidak terdapat bukti untuk menyokong penegasan sedemikian. Oleh itu, pempetisyen tidak mempunyai locus standi H I

untuk mengemukakan petisyen penggulungan dan atas alasan ini sahaja, petisyen penggulungan itu boleh diketepikan.

(3) Terdapat pertikaian bona fide mengenai kewujudan hutang itu yang dihutang daripada syarikat itu kepada pempetisyen itu, berdasarkan alasan substansial. Oleh itu, petisyen penggulungan itu mesti ditolak.

(4) Apabila penindasan dikatakan, sama ada kes itu didengar atas s 181 atau atas peruntukan adil dan saksama, pertimbangannya adalah lebih kurang sama. Di dalam kedua-dua kes, mahkamah mesti mempertimbangkan latar belakang dan semua keadaan kes itu, termasuk perhubungan di antara kedua-dua pihak dan kelakuan mereka terhadap satu sama lain apabila mencapai keputusan itu. Dengan itu, kes-kes yang telah diputuskan di bawah undang-undang kontrak yang berkaitan dengan kebolehterimaan keterangan ekstrinsik, apabila mentafsirkan terma kontrak yang bertulis, tidak terpakai apabila mempertimbangkan suatu kes yang berdasarkan atas perhubungan di antara dua-dua pihak yang dikawal oleh pertimbangan keadilan dan kesaksamaan.

(5) Atas imbangan kebarangkalian, pempetisyen telah berakujanji untuk menyuntik wang ke dalam responden pertama. Oleh itu, pempetisyen telah memungkiri akujanji itu dan itu merupakan suatu perkara yang serius kerana obligasi itu merupakan obligasi asasi.

(6) Atas imbangan kebarangkalian, asas di atas mana petisyen itu telah dikemukakan merupakan perkara yang telah disebabkan oleh salahlaku pempetisyen sendiri. Jika pempetisyen telah menepati janjinya dan bertindak mengikut akujanjinya untuk menyuntik wang ke dalam responden pertama, perkara yang diadu tidak akan berlaku.

(7) Memandangkan keseluruhan kes itu, pempetisyen bukan sahaja telah gagal menunjukkan suatu kes penindasan tetapi pada hakikatnya merupakan penindas yang sebenar. Oleh itu, pempetisyen tidak berhak mendapat suatu perintah penggulungan disebabkan salahlakunya. Dengan itu, pempetisyen telah diperintahkan supaya menjual sahamnya kepada responden kedua, ketiga dan keempat dan responden telah diperintahkan supaya membeli saham pempetisyen pada harga yang akan ditetapkan di dalam suatu siasatan.

(8) Sesuatu pihak tidak berhak mendapat faedah daripada sebarang transaksi di mana suatu pihak berkuasa awam telah diperdaya.

(9) Kekurangan sikap berterus-terang akan, di dalam keadaan tertentu, merupakan penindasan. Di dalam kes ini, pempetisyen telah bertindak tidak berterus-terang dan kelakuan sedemikian akan merupakan penindasan.

(10) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') tidak mengandungi sebarang peruntukan spesifik untuk mengemukakan

atau mendakwa suatu petisyen balas tetapi ini tidak akan menghalang mahkamah daripada melayan permohonan sedemikian. Tidak terdapat apa-apa di dalam KMT yang menghalang petisyen balas itu daripada dikemukakan. Suatu kod acara sivil tidak boleh meramalkan dan bersedia menghadapi setiap kemungkinan. Di mana ia tidak berbuat demikian, A 92 k 4 KMT boleh digunakan untuk menghalang sebarang ketidakadilan.

Obiter:

(1) Apabila sesuatu perkara diputuskan atas keterangan afidavit, suatu penegasan semata-mata tanpa lebih tidak akan menjadikan isu yang dikemukakan itu keterangan viva voce yang boleh dibicarakan. Tugas hakim tidak berakhir sebaik sahaja suatu fakta ditegaskan oleh mana-mana pihak dan dinafikan atau dipertikaikan oleh pihak yang lain di dalam suatu afidavit.

(2) Walaupun pengarah atau pemegang saham majoriti sesebuah syarikat bersalah kerana kelakuan yang salah atau tidak munasabah dan dengan itu terdapat kes prima facie untuk mendapat relief atas alasan adil dan saksama, relief sedemikian tidak akan dibenarkan jika tujuan sebenar pempetisyen adalah untuk memperolehi wang yang terhutang kepada mereka daripada syarikat itu.]

[*Editorial Note*: The petitioner has appealed to the Supreme Court vide Civil Appeal No 02–551–93 in respect of Petition No D6–28–84–92 and Civil Appeal No 02–552–93 in respect of Petition No D3–26–13–91.]

Notes

For cases on the winding up of a company, see 3 *Mallal's Digest* (4th Ed) paras 233–304; [1989] Mallal's Digest 115, 147–167; [1990] Mallal's Digest 96, 116–131; [1991] Mallal's Digest 594, 598, 605–627; [1992] Mallal's Digest 473–496.

Cases referred to

1 *Lai Kim Loi v Dato' Lai Fook Kim & Anor* [1989] 2 MLJ 290 (refd)
2 *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400 (folld)
3 *Tan Sooi Shin v Kow Kek Hing* [1991] 3 MLJ 390 (refd)
4 *Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 WLR 413; (1987) 131 SJ 473 (refd)
5 *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229 (refd)
6 *Eastern & Oriental Hotel (1951) Sdn Bhd v Ellarious George Fernandez & Anor* [1989] 1 MLJ 35 (refd)
7 *Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v Ling Beng Sung* [1978] 2 MLJ 227 (refd)

A
8 *Re Tivoli Freeholds Ltd* [1972] VR 445 (refd)
9 *Re HR Harmer Ltd* [1959] 1 WLR 62; [1958] 3 All ER 689 (folld)
10 *Re Associated Tool Industries Ltd* (1963) 5 FLR 55; [1964] ALR 73 (refd)
11 *Ramashankar Prosad & Ors v Sindri Iron Foundry (P) Ltd & Ors* AIR 1966 Cal 512 (refd)
B
12 *Re Rica Gold Washing Company* (1879) 11 Ch D 36 (refd)
13 *Re Othery Construction Ltd* [1966] 1 WLR 69; [1966] 1 All ER 145 (refd)
14 *Re Senson Auto Supplies Sdn Bhd* [1988] 1 MLJ 3216 (folld)
15 *Apirami Sdn Bhd v Tamil Nesan (M) Sdn Bhd & Ors* [1986] 1 CLJ
C 493 (folld)
16 *Mann & Anor v Goldstein & Anor* [1968] 2 All ER 769; [1968] 1 WLR 1091 (folld)
17 *Newacres Sdn Bhd v Sri Alam Sdn Bhd* [1991] 3 MLJ (refd)
18 *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360; [1972] 2 All
D ER 492; [1972] 2 WLR 1289 (refd)
19 *Keng Huat Film Co v Makhanlall (Properties)* [1984] 1 MLJ 243 (refd)
20 *Re A & BC Chewing Gum Ltd; Topps Chewing Gum Inc v Coakley* [1975] 1 All ER 1017; [1975] 1 WLR 579 (refd)
21 *Malayan Banking Bhd v Foo See Moi* [1981] 2 MLJ (refd)
E 22 *Suntoso Jacob v Kong Miao Ming & Anor* [1984] 2 MLJ 95 (folld)
23 *Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd* [1990] 1 MLJ 356 (refd)
24 *Nasib Singh v Ramasamy* [1969] 1 MLJ 211 (refd)
25 *Re East West Promotions Pty Ltd* (1986) 4 ACLC 84 (refd)
F 26 *Nainsingh v Koonwarjee* AIR 1970 SC 997 (refd)
27 *Sarwan v Amar* AIR 1980 P & H 162 (refd)
28 *Cotton Corp v United Industrial Bank Ltd* AIR 1983 SC 1272 (refd)
29 *Pacific Centre Sdn Bhd v United Engineers* [1984] 1 MLJ 143 (refd)
30 *Lee Lee Cheng v Seow Peng Kwang* [1960] MLJ 1 (refd)
31 *Permodalan MBf Sdn Bhd v Tan Sri Datuk Seri Hamzah bin Abu*
G *Samah & Ors* [1988] 1 MLJ 178 (refd)

Legislation referred to

Companies Act 1965 ss 33(1), 181, 217, 218
Evidence Act 1950 s 92
H Rules of the High Court 1980 O 14, O 88 r 5(h), O 92 r 4
Civil Procedure Code s 151 [Ind]
Companies Act 1948 s 210 [UK]
Companies Ordinance 1962 s 186 [Aust]

I *Lambert Rasa-Ratnam* (*Iain Sedgley* with him) (*Lee Hishamuddin*) for the petitioner.

G Sri Ram (*Rajkumari* with him) (*Megat Najmuddin Leong & Co*) for the respondents.

Anuar J: These are two petitions under the Companies Act 1965 (which for convenience, I will, throughout this judgment, refer to as 'the Act'). Petition No D3–26–13–91 has been filed under s 181 of the Act and Petition No D6–28–84–92 has been filed under s 218 of the Act. For brevity's sake, I will refer to each of them as the oppression petition and the winding-up petition, respectively.

In order to appreciate the dispute in this case, it is necessary to identify the parties involved.

In the oppression petition, Kumagai-Gumi Co Ltd is the petitioner and the respondents are Zenecon-Kumagai Sdn Bhd, Zenecon Sdn Bhd, Low Hua Kin @ Loo Wah Kim, Cheah Woon Kwong, Loo Hoi Kin @ Liew Hoe Kin and Yu Hee Ming.

In the winding-up petition, the petitioner is Kumagai-Gumi Co Ltd and the company sought to be wound up is the first respondent in the oppression petition. For convenience, I will, throughout this judgment, be referring to Kumagai-Gumi Co Ltd as 'the petitioner' and Zenecon-Kumagai Sdn Bhd as 'the company', in reference to both petitions. References to other respondents will be in the order in which they appear in the oppression petition.

After filing the oppression petition on 2 May 1991, the petitioner took out an ex parte summons-in-chambers dated 2 May 1991 asking for several orders in the nature of injunctions. On the same day, that is to say, 2 May 1991, the petitioner obtained an ex parte order in terms of its application before VC George J. In view of the approach I have taken in this case, it is important that the terms of that order be reproduced. This is how that order reads:

> Upon the application of Kumagai Gumi Co Ltd, the petitioner in this action and upon reading the summons-in-chambers dated 2 May 1991 and the affidavits of Shungo Okazaki both affirmed on 2 May 1991, and all filed herein and upon hearing Mr Lambert Rasa-Ratnam of counsel for the petitioner abovenamed and the petitioner by its counsel undertaking to abide by any order the court or a judge may make as to damages in case the court or a judge shall hereafter be of opinion that the respondents shall have sustained any by reason of this order which the petitioner ought to pay, it is ordered and directed that the respondents and each of them whether by themselves their servant and/or agents or otherwise howsoever be restrained, and an injunction is hereby granted restraining:
>
> (a) them from convening and/or attending the extraordinary general meeting of the members and shareholders of the first respondent fixed for 3 May 1991 at 2.30pm or any adjourned meeting in respect thereof;
> (b) them from removing and/or threatening to remove Mr Yoshio Ichijo and/or any other directors appointed by the petitioner as a director of the first respondent unless requested for by the petitioner;
> (c) them from inviting to be present at any meeting of the shareholders, directors and/or the board of directors of the first respondent any third party or person not being a shareholder or director of the first respondent, or its company secretary duly appointed as such, without the prior approval of the shareholders or directors present at any such meeting;
> (d) them from exercising their rights and/or powers whether as members, shareholders and/or directors or howsoever in any manner inconsistent with

A or contrary to the provisions of the agreement dated 18 July 1989 (hereinafter called the said agreement);

(e) the third respondent from exercising and/or purporting to exercise any casting and/or second vote at any meeting of the directors or the board of directors of the first respondent;

(f) them from acting on and/or implementing and/or carrying into effect in any B manner whatsoever any or all the resolutions passed and/or decisions made or taken at the meeting of the board of directors of the first respondent held on 4 April 1991;

(g) the sixth respondent from acting and/or holding herself out as an officer or company secretary of the first respondent and from discharging any functions of whatsoever nature in relation to any such office;

C (h) them from attending and/or holding a meeting of the directors of the first respondent at which the requisite quorum required under the said agreement is not duly present;

(i) the third and fourth respondents and each of them whether by themselves their servants and/or agents or otherwise howsoever from exercising any powers and/or rights as shareholders of the first respondent.

D pending the final disposal of this petition or until further order and it is ordered that a copy of this order be deposited with the registrar of companies, Malaysia and it is lastly ordered that the costs of and incidental to this application be costs in the cause.

On 19 June 1991, the respondents took out an application to discharge the E orders made by VC George J. That application came up before him on 10 July 1991 and he, no doubt realizing that hearing the application would involve as much time as disposing of the petition, in my view, rightly made no order on the summons in view of the fact that the petition would be heard and disposed of on an early date. At that time, the petition had been fixed for disposal on 17 July 1991 although, as matters turned out, it was F not heard on that date.

As matters transpired, the petition remained unheard for a considerable time. At one stage, the respondents' solicitors wrote to me when I was functioning as the acting Chief Justice, requiring me to give directions. I then assigned the petitions to be heard by the learned judicial commissioner G in the commercial division. Unfortunately, he had a full list and subsequently went on transfer to Penang. It appears that in the meantime, the petitioner was pressing for the hearing of its application to have receivers and managers appointed whilst the respondents were pressing for a disposal of the petitions on their merits. Having received no response from the commercial division, the respondents' solicitors once again appealed in writing to me in my H capacity as acting chief justice. Thereafter, I invited counsel for both parties to attend before me to see how best the matters could be disposed of. I expressed my willingness to hear the petitions if the parties were prepared to proceed expeditiously. Both Mr Rasa-Ratnam who appeared for the petitioner and Mr Sri Ram who appeared for all the respondents, save the I company, agreed to this course. With the consent of both parties, the petitions were brought before me.

On 25 October 1991, the petitioner took out a summons for the appointment of receivers and managers of the first respondent. I heard the

application on 8 September 1992 and dismissed it. An appeal has been lodged against my decision.

Digressing for a moment, when I heard that application, it seemed to me that the best way in which matters could be resolved was to expeditiously hear and dispose of the petition proper rather than to deal with interlocutory applications piecemeal. I accordingly made that suggestion to counsel before I commenced hearing the application for receivers.

Counsel for the respondents was prepared to accept what I said whilst counsel for the petitioner appeared reluctant to take up the suggestion. I do not think I would be discourteous to counsel for the petitioner if I were to say that I was left with the distinct impression that the petitioner displayed a desire to delay the hearing of the petitions for as long as possible as my suggestion did not appear to appeal to him when I made it. One can perhaps well understand the petitioner's desire to delay the case as it was already in an advantageous position with an injunction in its favour.

Returning to the mainstream, the petitioner in the meantime presented the winding-up petition on 4 March 1992 and this was originally fixed for hearing on 25 June 1992. On 4 May 1992, the petitioner took out a summons to consolidate the winding-up petition with the oppression petition, but later, probably realizing that this would not be possible in view of the decision of the Supreme Court in *Lai Kim Loi v Dato' Lai Fook Kim & Anor*,[1] obtained an order on 25 June 1992 that the two petitions be heard together.

On 20 November 1991 and 3 September 1992, the petitioner took out two further summonses in the oppression petition (encls 45 and 73) to strike out portions of the affidavits filed by the respondents. I heard these applications on 16 December 1992. After having heard lengthy arguments presented by both sides, I reserved my decision which I delivered orally on 23 December 1992 when I dismissed both summonses. My reasons for doing so will become apparent in the course of this judgment.

The application to cross-examine

On 2 December 1992, the petitioner took out yet another summons (encl 95), this time for an order that there be liberty to cross-examine the third and fourth respondents on the affidavits filed by them in the oppression petition. This application came up for hearing on 18 March 1993, being the first day of the trial of the petitions. On my invitation, counsel for the petitioner agreed to open his client's case and to move the application formally after that. This he did on 20 April 1993. After hearing arguments by counsel on both sides, I delivered a short oral ruling refusing the application. I now give my reasons for doing so.

Whether cross-examination should be ordered in a matter like this is within the discretion of the court. In order to enable me to exercise my discretion in its favour, I invited counsel for the petitioner to identify which of the eight affidavits filed by the third respondent that he wished to direct cross-examination upon. He replied that he wanted to cross-examine the third respondent on all his affidavits. I also invited him to draw to my

attention the areas in which cross-examination was to be directed. Counsel indicated that he wished to cross-examine in respect of all areas. He made a similar request in respect of the fourth and fifth respondents. He applied to have encl 95 amended to include the fifth respondent. I did not permit that amendment because it was a matter which could have been done well before the case began as this must have been within the petitioner's contemplation for some time before the hearing dates were fixed.

After hearing counsel for the petitioner and counsel for the respondents, I came to the conclusion that in this matter, the approach of the court should be to examine the contemporaneous documents and the conduct of the parties in order to determine whether a case of oppression had been made out.

Where a matter is being adjudged on affidavits, it is, I think, settled law that a mere assertion without more will not make the issue raised thereby to be triable viva voce evidence. In *Bank Negara Malaysia v Mohd Ismail & Ors*,[2] when dealing with a case under O 14, the Supreme Court (by a majority) observed [at p 408] that:

> ... the duty of a judge does not end as soon as a fact is asserted by any one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements made by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable.

As I have pointed out, the foregoing statement of the principle was made in the context of an O 14 case. In my judgment, the same principle would apply where a case has been tried on affidavit evidence and I have adopted this approach in the present case.

In *Tan Sooi Shin v Kow Kek Hing*,[3] VC George J refused cross-examination on the ground that judicial time would be wasted in the determination of an academic question.

I considered all the circumstances of the case and took into account the fact that cross-examination will not advance the cause of justice. In my judgment, the matter could be decided without reference to any cross-examination since there were abundant documentary evidence that was not disputed which would enable any court in my position to arrive at a decision on the matter. In exercising my discretion, I took into account all matters advanced by the petitioner and the respondents, and weighing these, I was satisfied that discretion should be exercised against the petitioner and I accordingly dismissed the application to cross-examine contained in encl 95.

Following my refusal to permit examination, I proceeded with the hearing of the petitions.

Approach to the case

Before dealing with the facts of the case and the evidence that has been presented before me, there are some preliminary matters on which I must comment.

Firstly, in assessing the evidence and discerning the facts of this case, I have constantly borne in my mind my decision to refuse cross-examination. The consequence of my decision is that I must confine myself only to those facts that have been admitted or have not been credibly denied and in the probabilities of the case. In this I have been guided by the judgment of Lord Templeman in *Tay Bok Choon v Tahansan Sdn Bhd*[4] where at p 419, when delivering the advice of the board, he said:

> At the end of the day the judge must decide the petition on the evidence before him. If allegations are made in affidavits by the petitioner and those allegations *are credibly denied* by the respondent's affidavits, then in the absence of oral evidence or cross-examination, the judge must ignore the disputed allegations. The judge must then decide the fate of the petition by consideration of the undisputed facts. (Emphasis added.)

Secondly, in approaching the evidence and in its appreciation, I have tested the allegations in the several affidavits against the contemporaneous documentary evidence, against all the surrounding circumstances and against the probabilities of the case. In doing so, I have relied on passages in two cases, namely, *Tindok Besar Estate Sdn Bhd v Tinjar Co*[5] and *Eastern & Oriental Hotel (1951) Sdn Bhd v Ellarious George Fernandez & Anor.*[6]

In the first of these, Chang Min Tat FJ, in dealing with an appeal from a trial conducted on viva voce evidence, said [at p 234]:

> Nevertheless the learned trial judge expressed himself to be completely satisfied with the veracity of the respondent's witnesses and their evidence. He purported to come to certain findings of fact on the oral evidence but did not notice or consider that the respondent's oral evidence openly clashed with its contemporaneous documentary evidence. For myself, I would with respect feel somewhat safer to refer to and rely on the acts and deeds of a witness which are contemporaneous with the event and to draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness with a purpose of his own to serve and if it did not account for the statements in his documents and writings. Judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case. Plausibility should never be mistaken for veracity.

In the latter case, Wan Hamzah SCJ, also in dealing with an appeal from a trial conducted on viva voce evidence, put the matter in this way [at p 37]:

> We would respectfully agree with the soundness of the observation made in *Armagas Ltd v Mundogas SA (The 'Ocean Frost')* [1985] 1 Lloyd's Rep 1 which reads:
>
> > 'It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents to the witnesses' motives, and to the overall probabilities can be of very great assistance to a judge in ascertaining the truth.'
>
> In commercial cases there is usually a substantial body of contemporary documentary evidence. This is not strictly speaking a commercial case, but the relevancy of contemporaneous documents nevertheless holds true.

A Thirdly, I remind myself that the petitions that I am dealing with have been presented under ss 181 and 218, respectively, of the Act. It is therefore necessary for me to direct myself on the law generally applicable to such petitions, whilst always bearing in mind that I have to decide this case on its own particular and peculiar facts.

B *The law governing oppression petitions*

Section 181 is in the following terms:

(1) Any member or holder of a debenture of a company or, in the case of a declared company under Part IX, the Minister, may apply to the Court for
C an order under this section on the ground —

(a) that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or holders of debentures including himself or in disregard of his or their interests as members, shareholders or holders of debentures of the company; or
D (b) that some act of the company has been done or is threatened or that some resolution of the members, holders of debentures or any class of them has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members or holders of debentures (including himself).

E (2) If on such application the Court is of the opinion that either of those grounds is established the Court may, with the view to bringing to an end or remedying the matters complained of, make such order as it thinks fit and without prejudice to the generality of the foregoing the order may —

(a) direct or prohibit any act or cancel or vary any transaction or resolution;
(b) regulate the conduct of the affairs of the company in future;
F (c) provide for the purchase of the shares or debentures of the company by other members or holders of debentures of the company or by the company itself;
(d) in the case of a purchase of shares by the company provide for a reduction accordingly of the company's capital; or
(e) provide that the company be wound up.

G (3) Where an order that the company be wound up is made pursuant to subsection (2)(e) the provisions of this Act relating to winding up of a company shall, with such adaptations as are necessary, apply as if the order had been made upon a petition duly presented to the Court by the company.

(4) Where an order under this section makes any alteration in or addition to any
H company's memorandum or articles, then, notwithstanding anything in any other provision of this Act, but subject to the order, the company concerned shall not have power without the leave of the Court to make any further alteration in or addition to the memorandum or articles inconsistent with the order; but subject to the foregoing provisions of this subsection the alterations or additions made by the order shall be of the same effect as if
I duly made by resolution of the company.

(5) An office copy of any order made under this section shall be lodged by the applicant with the Registrar within fourteen days after the making of the order.

Penalty: One thousand ringgit. Default penalty.

Before turning to the principles established by authorities which have dealt with the section or a similar provision in other jurisdictions, there are some observations that a plain reading of the section calls for.

In the first place, I am impressed by the wide powers that have been conferred upon the court by sub-s (2) of s 181. Once a case has been made out under either para (a) or (b) of sub-s (1) of s 181, it is clear that the court can make orders altering the memorandum or articles of a company which forms the contract between the shareholders. (See s 33(1) of the Act.) This is a serious inroad into the doctrine of freedom of contract which is one of the pillars of commercial law and it is a power which I think a court should exercise in a proper case.

Counsel on both sides cited several authorities and I trust that I will be forgiven if I do not deal with all of them as they, while restating established principles are merely decisions that are an application of those principles to the particular facts of each case. Nevertheless, I think it is necessary for me to refer to passages in some of the well-known decisions on s 181 or its equivalent in other jurisdictions in order to appreciate the principles that govern the statutory remedy.

Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v Ling Beng Sung[1] is the leading authority on the principles governing petitions presented under s 181 of the Act. Lord Wilberforce, in delivering the advice of the Privy Council, after setting out s 181(1) and (2) of the Act, said [at pp 228–229]:

> This section can trace its descent from s 210 of the United Kingdom Companies Act 1948 which was introduced in that year in order to strengthen the position of minority shareholders in limited companies. It also resembles the rather wider s 186 of the Australian Companies Act 1951. But s 181 is in important respects different from both its predecessors and is notably wider in scope than the United Kingdom section. In sub-s (1)(a) it adds disregard of the interests of members, etc to oppression as a ground for relief in this respect making explicit what was already inherent in the section (see *Re HR Harmer Ltd* [1959] 1 WLR 62 at p 75). It introduces a new ground in sub-s (1)(b) and, most importantly, in sub-s (2), which sets out the kinds of relief which may be granted, it provides for 'remedying the matters complained of' and states as a specific type of relief that of winding-up of the company.
>
> Section 210 is differently constructed. Under it, the court is required to find that the facts would justify the making of a winding-up order under the 'just and equitable' provision in the Act, but also that to wind-up the company would unfairly prejudice the 'oppressed' minority. The Malaysian section, on the other hand, requires (under sub-s 1(a)) a finding of 'oppression' or 'disregard', and then leaves to the court a wide discretion as to the relief which it may grant, including among the options that of winding the company up. That option ranks equally with the others, so that it is incorrect to say that the primary remedy is winding-up. That may have been so before 1948 and even after the enactment of s 210, but is not the case under s 181.
>
> Their Lordships consider it important that courts applying s 181 should do so according to its terms and its purpose and should not regard themselves as necessarily bound by United Kingdom decisions, which are based upon a different section, and in some cases restrictive. The same applies, though with less force, to reliance upon Australian decisions upon s 186.

There are three particular points of direct relevance in the present appeal. First, it is claimed by the appellants that the section is not a substitute for a minority shareholders' action and, specifically, that many if not most of the matters complained of would properly form the subject of such an action. Their Lordships agree with this in part. Relief cannot be sought under s 181 merely because facts are established which would found a minority shareholders' action: the section requires (relevantly) 'oppression' or 'disregard' to be shown, and these are not necessary elements in the action referred to. But if a case of 'oppression' or 'disregard' is made out, the section applies and it is no answer to say that relief might also have been obtained in a minority shareholders' action. To the extent that the appellants so contend their Lordships do not accept their argument.

Secondly, for the case to be brought within s 181(1)(a) at all, the complaint must identify, and prove 'oppression' or 'disregard'. The mere fact that one or more of those managing the company possess a majority of the voting power and, in reliance upon that power, make policy or executive decisions, with which the complainant does not agree, is not enough. Those who take interests in companies limited by shares have to accept majority rule. It is only when majority rule passes over into rule oppressive of the minority, or in disregard of their interests, that the section can be invoked. As was said in a decision upon the United Kingdom section there must be a visible departure from the standards of fair dealing and a violation of the conditions of fair play which a shareholders is entitled to expect before a case of oppression can be made (*Elder v Elder & Watson Ltd* 1952 SC 49): their Lordships would place the emphasis on 'visible'. And similarly 'disregard' involves something more than a failure to take account of the minority's interest: there must be awareness of that interest and an evident decision to override it or brush it aside or to set at naught the proper company procedure (per Lord Clyde in *Thompson v Drysdale* 1925 SC 311 at p 315). Neither 'oppression' nor 'disregard' need be shown by a use of the majority's voting power to vote down the minority: either may be demonstrated by a course of conduct which in some identifiable respect, or at an identifiable point in time, can be held to have crossed the line.

Thirdly, in a number of United Kingdom decisions it has been held that for s 210 to apply the complainant must show oppression continuing up to the date of proceedings (eg *Re Jermyn Street Turkish Baths Ltd* [1971] 1 WLR 1042); where there has been oppression in the past, the section does not bite. Their Lordships agree that the wording of the section (and the same is true of s 181(1)(a)) relates to a present state of affairs: 'are being conducted', powers 'are being exercised' are grammatically clear: the language may be contrasted with that of s 181(1)(b) which refers to an act of the company which has been done or threatened. But this argument must not be taken too far. *What is attacked by sub-s (1)(a) is not particular acts but the manner in which the affairs of the company are being conducted or the powers of the directors exercised.* And these may be held to be 'oppressive' or 'in disregard' even though a particular objectionable act may have been remedied. A last minute correction by the majority may well leave open a finding that, as shown by its conduct over a period, a firm tendency or propensity still exists at the time of the proceedings to oppress the minority or to disregard its interests so calling for a remedy under the section. This point is well brought out in *Re Bright Pine Mills Pty Ltd* [1969] VR 1002 at pp 1011–1012.

Their Lordships have made these observations upon the Malaysian s 181, not because they disagree with the statement of the law by the Federal Court — which indeed recognized the wider scope of s 181 as compared with the corresponding provisions in England and in Australia. They are concerned

rather to emphasize the utility of the jurisdiction conferred upon the courts in Malaysia, and to deal with particular arguments urged in this case with some of which they do not agree. (Emphasis added.)

In *Re Tivoli Freeholds Ltd*[8] at p 452, Menhennitt J said:

Whether or not a company is being conducted in a manner oppressive to certain shareholders depends upon all the circumstances and it is not possible to attempt a universal definition. However, in the kind of situation which arises in this case and having regard to the matters relied upon by the petitioner and the supporting members, the following elements are I think included in the matters postulated in the section and are also established by the authorities:

(1) Those alleging that the affairs of the company have been conducted in a manner oppressive to them must establish, as one element, conduct which the Court of Appeal has recently restated in the case of *Re Jermyn Street Turkish Baths Ltd* [1971] 1 WLR 1042 at p 1059, as conduct which 'is unfair or, to use the expression adopted by Viscount Simonds in *Scottish Co-operative Wholesale Society Ltd v Meyer* [1959] AC 324 at p 342, "burdensome, harsh and wrongful" to the other members of the company or some of them, and lacks that degree or probity which they are entitled to expect in the conduct of the company's affairs: see *Scottish Co-operative Wholesale Society Ltd v Meyer* and *Re HR Harmer Ltd* [1959] 1 WLR 62'.

It is to be noted that Buckley LJ, delivering the judgment of the court, appears to have stated lack of probity of the kind described as an element additional to the requirement that the conduct must be unfair or burdensome, harsh and wrongful. In *Scottish Co-operative Wholesale Society Ltd v Meyer*, Lord Keith at p 364, stated the test as 'lack of probity and fair dealing', using the word 'and'. However, in Lord Keith's judgment in *Elder v Elder and Watson Ltd* 1952 SC 49 at p 60, adopted by Jenkins LJ in the case of *Re Harmer Ltd* at p 78, Lord Keith said: 'oppression involves, I think, at least an element of lack of probity or fair dealing to a member in the matter of his proprietary right as a shareholder.' There it is put in the alternative. In the light of these statements, I deal with this petition on the basis that there may be cases in which either lack of probity or unfairness may be sufficient in itself to make conduct oppressive to a member. In the unreported decision of Lush J in *M Dalley & Co Pty Ltd* (30 April 1968) his Honour stated, at p 43: 'In my opinion want of probity is only one of the ways in which oppression can manifest itself, as indeed the use of the alternative "lack of probity or fair dealing" by Lord Keith indicates. One person may "subject another to continual injustice" by insisting, however honestly, on a proposition that is wrong or by using his strength to maintain, however honestly, a position unjustified in law.' Later in his judgment as part of his finding that there had been oppression in that case his Honour said at p 45, that 'the respondents were fixed in their determination to classify the petitioner's shares as employee shares and so to remove her from the company at relatively small cost and to their own and their children's advantage'.

He later said that the respondents' stand was 'dictated by the self interest of the directors and obdurately maintained' (at p 46). Although the High Court reversed the decision of Lush J on another point ((1968) 43 ALJR 19), the order made by the High Court, at p 24, was an order for the purchase of the shares of minority shareholders, which can be made only under s 186 of the Companies Act 1961 and not on the just and equitable

ground alone under s 222(1)(h). For this reason, it appears to me that the High Court's order in *Dalley*'s case affirms the conclusion that there was oppression in that case. Accordingly, I proceed on the basis that persistent illegal conduct towards a shareholder may be sufficient to constitute oppression of him if it is dictated by self-interest.

(2) The oppression must be of the members as such, that is in their capacity as shareholders. It was so decided in *Re HR Harmer Ltd* [1959] 1 WLR 62 at p 75, in respect of the English equivalent provision, namely, s 210, and the Full Court in *Re Bright Pine Mills Pty Ltd* [1969] VR 1002 at p 1012, held that this consideration applies to s 186(1) of the Victorian Companies Act: see also per Lord Keith in the passage cited above from *Elder v Elder and Watson Ltd* 1952 SC 49.

(3) It appears to follow from the last-mentioned concept and the reference in the section to the affairs of the company being conducted in a manner oppressive to members that there must be something adverse, or detrimental to the members' financial interests as shareholders. In all the reported cases of which I am aware, where oppression has been found, this has been the fact and it was this aspect to which I understand Jacob J, referred when he said in *Re Broadcasting Station 2GB Pty Ltd* [1964–5] NSWR 1648 at p 1662, that, the word oppressive involves, among other things, that 'some member or members have suffered in a pecuniary sense in their capacity of members (*Scottish Co-operative Wholesale Society v Meyer*) that is to say, their rights as members have been affected'.

(4) The affairs of the company must be being conducted in a manner oppressive to some member or members when the petition is presented. This is involved in the expression 'are being conducted': see *Re Jermyn Street Turkish Baths Ltd* [1971] 1 WLR 1042 at p 1059.

(5) Oppression may occur even although all the members of a company are treated equally: see, for example, *Meyer*'s case. The unfairness may arise, for example, by reason of an advantage to a parent company.

(6) So far as the alleged oppressors are concerned, it must also be established it seems to me that oppression results from 'some overbearing act or attitude on the part of the oppressor': *Re Jermyn Street Turkish Baths Ltd* at pp 1042 and 1060. In delivering the judgment of the Court of Appeal, Buckley LJ, having defined aspects of oppression applicable to that case, then said at p 1060: 'We do not say that this is necessarily a comprehensive definition of the meaning of the word 'oppressive' in s 210, for the affairs of life are so diverse that it is dangerous to attempt a universal definition. We think, however, that it may serve as a sufficient definition for the present purpose. Oppression must, we think, import that the oppressed are being constrained to submit to something which is unfair to them as the result of some overbearing act or attitude on the part of the oppressor'.

Having stated that what had earlier been said was not necessarily a comprehensive definition, his Lordship appears to me to have then stated what is a universal element in the sentence beginning 'Oppression must, we think, import'. Again, whilst not stating it as a universal test, the Full Court in *Re Bright Pine Mills Pty Ltd* [1969] VR 1002 at p 1011, applied the test that 'conduct would be oppressive within the meaning of s 186 if directors or shareholders holding a controlling power in the direction of the company's affairs were to pursue a course of conduct designed by them to advance their own interests or the interests of others of their choice to the detriment of the company or the detriment of other shareholders'. The concept of 'some overbearing act or attitude' appears to me to be involved in Viscount

Simond's expression 'burdensome, harsh and wrongful'. To determine whether conduct is unfair it is necessary to examine it from the point of view of both the alleged oppressed and the alleged oppressor. In *Re M Dalley & Co Pty Ltd*, supra, in making his findings of oppression, Luah J relied upon his findings that the respondents had sought to remove the petitioner from the company at relatively small cost and had been dictated by self-interest.

(7) It is a corollary of the element referred to in (6) above that 'it was not intended by s 186 or s 94 to give jurisdiction to the court (a jurisdiction the courts have always been loath to assume) to interfere with the internal management of a company by directors who in the exercise of the powers conferred upon them by the memorandum and articles of association are acting honestly and without any purpose of advancing the interest of themselves or others of their choice at the expense of the company or contrary to the interest of other shareholders' (per the Full Court in *Re Bright Pine Mills Pty Ltd* [1969] VR 1002 at p 1011).

Buckley J, as he then was, referred to the same aspect in *Re Five Minute Car Wash Service Ltd* [1966] 1 WLR 745 at p 751; [1966] 1 All ER 232 at pp 246, 247, when he said: 'The mere fact that a member of a company has lost confidence in the manner in which the company's affairs are conducted does not lead to the conclusion that he is oppressed; nor can resentment at being outvoted; nor mere dissatisfaction with or disapproval of the conduct of the company's affairs, whether on grounds relating to policy or to efficiency, however well founded. Those who are alleged to have acted oppressively must be shown to have acted at least unfairly towards those who claim to have been oppressed'. (Emphasis added.)

The next case which I find useful is *Re HR Harmer Ltd.*[9] Roxburgh J who heard the matter at first instance, in his judgment, set out the approach to be taken on a petition under the UK provision (s 210 of the Companies Act 1948). His approach is set out in the judgment of Jenkins LJ in the Court of Appeal at pp 84–85 of the report and it is from that judgment that I quote. This is what was said:

> In his judgment, Roxburgh J, after saying that he adopted the reasoning of the Lord President, Lord Cooper, in *Meyer v Scottish Co-operative Wholesale Society Ltd*, said:
>
> 'That being so, for my part the section seems to admit of no ambiguity. The word "oppression" is a word in common use and understanding in the English language. But I would just observe in passing that it does not say who complains of act "of oppression"; it says "that the affairs of the company are being conducted in a manner oppressive ...". *In other words, I think it invites attention, not to events considered in isolation, but to events considered as part of a consecutive story*; and it is because I take that view that I have not dealt (and do not propose to deal) with each of the items which I have enumerated one by one. But I must pause to dismiss, so far as I am concerned, the submission made by Mr Russell (leading counsel for the father before Roxburgh J) to the effect, as I understood it, that the nature of the oppression that the section requires could be in some way affected by the use of the word "minorities". To start with, I can see no need to introduce any modification into the words of the statute, which seem to me to be sufficiently plain. Secondly, I do not think that the word "minorities" was intended to be introduced at that point. I think the point about the

word "minorities" is that it is only where the voting control is elsewhere that a case for the application of the section arises. To take this case, if the voting control had resided where the beneficial interest in the ordinary shares resides, there would have been no need to invoke the section. The (father) would have been eradicated root and branch by this time. It is only because of the beneficial voting interest and his having voting control that it is necessary to invoke the section at all. I cannot think of any case where it would be possible to invoke the section if the voting control was in the hands of the persons who are alleged to have been oppressed; and that, I think, is the only and natural explanation of the word "minorities" being there.'

Then he says:

'*It remains, in my view, a question for the court to decide on the whole story, as revealed in the evidence,* whether the affairs of the company are being — it has to be a state of affairs continuing at the date of the petition — conducted in a manner oppressive to some part of the members. I do not know that it has any particular bearing on the case, but this case is curious in that it is not a minority beneficial interest that is being oppressed, and that would be the normal case; it is a majority beneficial interest which is being oppressed because the voting control is placed in the hands of a minority beneficial interest. In my judgment, I reach the opinion — because that is what I have to do — that at the date of the presentation of this petition the affairs of the company were being conducted in a manner oppressive to the petitioners.' (Emphasis added.)

It is clear that for s 181 to bite, it is not essential that the oppressors should have a controlling interest in the company. This is made clear by the decision in *Re Associated Tool Industries Ltd*[10] which was a case decided under the Australian s 186. The headnote of that case reads as follows:

A petition was brought by members of a company against the company and three directors of the company seeking an order under s 186(2)(b) of the Companies Ordinance 1962 ('ACT') that the individual respondents purchase the shares of the petitioners in the company on the ground that the affairs of the company were being conducted in a manner oppressive to the petitioners. The conduct complained of was the conduct of the affairs of the company in relation to an associated company and subsidiary companies, of which the individual respondents were also directors, including the holding out against the acquisition of control by the company of the associated company, which was greatly dependent on the company, unless a price set by the individual respondents for the acquisition of their shares in the associated companies was paid.

Held:

(1) That, on the facts, the conduct of the respondents was oppressive within the meaning of s 186(1) of the Ordinance, and was continuing. Circumstances in which s 186 of the Ordinance operates, what constitutes conduct of the affairs of the company in a manner oppressive to one or more of the members, and the necessity for the utmost good faith between subsidiary and holding companies, considered.

(2) That it was not essential that the individual respondents should have a controlling interest in the company.

(3) That where the oppressive conduct was continuing, delay in seeking relief was not a ground for refusing such relief.

(4) That the condition provided for by s 186(2)(b) of the Ordinance, that the court should be of opinion that to wind up the company would unfairly prejudice the petitioners but otherwise the facts would justify the making of a winding-up order on the ground that it was just and equitable that the company be wound up, was fulfilled in the circumstances of the case and that an order should be made for the purchase by the individual respondents of the shares of the petitioners.

(5) That s 186 of the Ordinance did not enable the court to make an order charging the payment of the purchase price of the shares on the shares already held by the individual respondents.

In *Ramashankar Prosad & Ors v Sindri Iron Foundry (P) Ltd & Ors*,[11] when dealing with the Indian provision which is the equivalent of s 210 of the UK Act, it was held that the Indian section was not limited to minority shareholders. The reasoning is interesting. The UK s 210 falls under the statutory heading written into the Companies Act 1948 entitled 'Minorities'. Such a heading is absent in the Indian provision and equally in our own provision. I would therefore agree with the view expressed by Mitter J in *Ramashankar Prosad*[11] and hold that relief under s 181 is available to majority shareholders who are not in control of the management of the company and who, for any given reason, are unable to control the board, eg because they have agreed to a management power sharing formula in a separate agreement among the shareholders.

The winding-up petition

According to counsel for the petitioner, the winding-up petition is based on three grounds, namely:

(1) inability to pay debts and consequent insolvency;
(2) that the directors have acted in their own interests under s 218(1)(f); and
(3) just and equitable ground.

Counsel for the petitioner referred me, in the course of arguments, to paras 30, 31, 32 and 33 of the winding-up petition which I now reproduce:

30 Your petitioner has made application to the company for payments of its debts but the company has failed and neglected to pay the same or any part thereof.

31 The company is also indebted to your petitioner, as at 31 January 1992, in the sum of ¥937,619,322 in respect of the loan referred to in para 9 hereinabove which (at the exchange rate of 47.84 as at 31 January 1991) is equivalent to RM19,599,066.09, repayment of which is now due on 31 October 1992 together with interest accruing thereon from 1 February 1992 until the date of full payment.

32 The company is insolvent and unable to pay its debts.

33 In the circumstances it is just and equitable that the company should be wound up.

To avoid duplicity, I propose to put aside the self-interest and just and equitable grounds for the moment. I will deal with them later as much of

A the material relied upon in support of these grounds are identical to those relied upon in support of the oppression petition. Indeed, in many areas there is considerable overlap between the two petitions. For the present, I will deal with the allegation that the company is unable to pay its debts and is insolvent.

B The debt, the non-payment of which is relied upon to support the petition, is a debt allegedly owed by the company to the petitioner. The petitioner is a contributory and has presented the winding-up petition as such. This is made clear by the allegation in para 3 of the petition which states that the petitioner was issued 490,000 shares in the company. There is no dispute that the petitioner is a fully paid-up shareholder of the C company.

Now, it is settled law that where a fully paid-up shareholder presents a petition to wind up the company, he must both allege in his petition and show by evidence that there are assets of the company of such an amount that in the event of a winding-up, he would have a tangible share of the D surplus to receive. If this is not done, the petition is liable to fail in limine: *Re Rica Gold Washing Co.*[12] In *Re Othery Construction Ltd*[13] the headnote reads as follows:

> A shareholder in a company presented a petition for the compulsory winding up of the company. The whole of the capital was paid up or credited as paid up. The petition alleged that the company was insolvent and unable to pay its debts and E made further allegations concerning the manner in which the company's affairs were being conducted.
>
> On the preliminary point that the petition was demurrable —
>
> Held:
> (1) That where a fully paid shareholder petitioned for compulsory winding up F he must show, on the face of the petition, a prima facie probability that there would be assets available for distribution amongst the shareholders.
> (2) That that rule was not affected by s 225(1) of the Companies Act 1948.
> (3) That there was no exception to that rule in the case where the company's affairs required investigation, it being no part of the business of a paid-up shareholder to present a petition to the court as an amicus curiae or as a G friend of the creditors of the company.
> (4) That, accordingly, since it appeared on the facts alleged in the petition that there would be nothing available for distribution amongst the shareholders, the petitioner had no locus standi, and the petition was demurrable.

I have scrutinized the winding-up petition very carefully and I cannot find any allegation that there would be a surplus available for distribution H among the shareholders. Neither am I able to find any evidence in support of such a contention. I therefore hold, following well-established authorities, that the petitioner has no locus standi to present the winding-up petition and that on this ground alone, the winding-up petition should be dismissed.

As regard the allegation of inability to pay the debt alleged to be owed by I the company to the petitioner, the evidence prima facie shows that this debt is seriously disputed by the company and the other contributories or shareholders on substantial grounds. I will deal with the evidence in greater

detail as there is some overlap in this respect between the winding-up petition and the oppression petition. Nevertheless, looking at the evidence in its totality and taking into account all the relevant matters which have been submitted to me by counsel on both sides, I am entirely satisfied that there exists, in this case, a bona fide dispute as to the existence of the debt based on substantial grounds. In such circumstances, the winding-up petition should be dismissed in accordance with the principles established by the cases.

Thus, in *Re Senson Auto Supplies Sdn Bhd*,[14] Edgar Joseph Jr J, after reviewing the authorities, held that even if the directors or majority shareholders of a company had been guilty of improper or unreasonable conduct so that there appears to be a prima facie case for relief on just and equitable ground, such relief will nevertheless be refused if the real purpose of the petitioners is to obtain payment owed by the company. I note in passing that the principles laid down in *Senson Auto*[14] appear to be a complete answer to the self-interest and just and equitable grounds relied upon by the petitioner. Nevertheless, in deference to the trouble that counsel for the petitioner has taken, I will, as I have indicated earlier in this judgment, deal with these two grounds later.

In view of my finding that there is a bona fide dispute on substantial grounds as to the existence of the debt or liability to pay it and applying the principles laid down in such cases as *Senson Auto*,[14] *Apirami Sdn Bhd v Tamil Nesan (M) Sdn Bhd & Ors*,[15] and *Mann & Anor v Goldstein & Anor*,[16] I hold that the winding-up petition should be also dismissed on this ground.

Facts — first part

I now turn to deal with the facts that are relevant to both petitions. The basic or primary facts are not in dispute. What is in dispute are collateral facts which are of no assistance to me in arriving at a decision on the petitions before me. I do not consider that a dispute upon some minor or collateral matter which has no bearing to a determination upon the real issues to constitute a serious question requiring investigation by viva voce evidence.

The primary facts in this case which are not in dispute are as follows. The company was incorporated on 9 October 1984. The authorized capital of the company is RM5m and the paid-up capital is RM1,000,002. The third and fourth respondents were the original subscribing shareholders of the company. Later, 490,000 shares were issued to the petitioner and 510,000 shares were issued to the second respondent. I have extracted these facts from para 3 of the winding-up petition.

It is not disputed by the parties that the company was incorporated as a joint venture between the petitioner (a Japanese company) and the second respondent (a Malaysian company). On 18 July 1989, a formal shareholders' agreement was entered into between the petitioner and the second, third and fourth respondents, respectively. It is now necessary for me to digress for a moment and deal with some salient aspects regarding the judicial appreciation of the evidence before me.

Applicability of the extrinsic evidence rule

As admitted joint venturers, the shareholders owe to each other duties akin to partners: *Newacres Sdn Bhd v Sri Alam Sdn Bhd.*[17] It follows that if one or more of the shareholders insist on the enforcement of strict legal rights provided for by the corporate documents, whether these be the memorandum and articles of association or some other document in addition to those, such as a written agreement between the shareholders, the court, whether in exercise of its jurisdiction under the just and equitable ground provided in s 218 or under s 181, is entitled to superimpose equitable obligations on those who insist on strict legal rights. Regard has to be had to the relationship between the parties and to all the circumstances of the case to see whether what is being done is fair, reasonable and just. In my judgment, much of the phraseology used in this context by the decided cases is nothing more than a matter of semantics.

Thus, in *Ebrahimi v Westbourne Galleries Ltd*,[18] Lord Wilberforce deprecated the creation of specific categories in the exercise of the just and equitable jurisdiction under the English equivalent of s 218 of the Act and put the basis of the exercise of the court's powers in this way [at p 379]:

> It [meaning the just and equitable provision] does, ... enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.

The same learned judge in the *Kong Thai Sawmill* case,[7] in the passages which I have already referred to earlier in this judgment, has used the expression 'a visible departure from the standards of fair dealing and the violation of the conditions of fair play' in the context of a case of oppression under s 181 of the Act.

In my judgment, where oppression is alleged, then, whether it be a case heard on s 181 or on the just and equitable provision, the considerations are more or less the same. Of course, the principles applicable are subject to the important qualifications set out in *Re Kong Thai Sawmill (Miri) Sdn Bhd.*[7] The court must, in either case, consider the background and all the circumstances of the case, including the relationship between the parties and their conduct towards each other when coming to a decision. Consequently, I am of the view that cases decided under the law of contract that deal with the admissibility of extrinsic evidence, when construing the terms of a written document, are not helpful nor even applicable when considering a case based on a relationship between the parties that is governed by considerations of fairness and justice.

Thus, under the ordinary law of contract, when an agreement between parties embodied in a written document is being construed, then, save for some limited exceptions provided in s 92 of the Evidence Act 1950, extrinsic evidence, such as negotiations prior to the making of the document, is inadmissible: *Keng Huat Film Co v Makhanlall (Properties).*[19] On the other hand, when I have to deal with a case which does not relate entirely to the meaning to be given to words contained in a written document but instead

to consider whether the parties have behaved fairly and justly towards one another — in a relationship that is very much like a fiduciary relationship — I am not bound to shut my eyes to their conduct over a period that is material to the case, in deciding whether one has behaved in a fair or just manner to the other. I am entitled — indeed I am obliged — to take into account all the circumstances of the case including events antecedent to the making of the document and even what was said in the course of negotiations leading up to the formalization of the written document. If I were to ignore such matters, then I would not be discharging the function of a judge hearing a case under ss 218 or 181 of the Act.

If there was an undertaking given by the petitioner to the third respondent during the negotiations prior to the making of the shareholders' agreement in the instant case, or some understanding had been reached between the parties which formed the basis of the agreement or which led one or more of the respondents to enter into that agreement, then, a breach by the petitioner of such an undertaking or understanding would, in my judgment, be relevant in considering whether it is entitled to insist on the strict enforcement of the terms of the shareholders' agreement. It is for these reasons that I refused the petitioner's application to strike out parts of the respondent's affidavits.

Facts — second part

I now return to the mainstream of the facts.

Prior to the shareholders' agreement, the company was managed by the third respondent pursuant to an arrangement between the shareholders. That such an arrangement existed is to be obviously gathered from the conduct of the parties and the admissions made by them in the numerous and voluminous affidavits filed by the parties. Nothing really turns upon the period when the third respondent was in management of the first respondent except that the petitioner complains that there were accumulated losses during that period. Counsel for the petitioner did not complain that there was oppression by the second, third and fourth respondents during that period.

Counsel for the petitioner took me through individual events under separate heads. He submitted that the series of events demonstrate a total breakdown of the mutual confidence between the parties to the litigation and that these events also constituted oppressive acts entitling relief both under ss 181 and 218 of the Act. Counsel for the second to fifth respondents, on the other hand, submitted that I should not consider the events referred to by the petitioner's counsel in isolation but as part of a consecutive story. The respondents' counsel submitted that an inquiry should be undertaken as to why the incidents complained of by the petitioner took place. If they took place, counsel submitted, because of the default of or breach by the petitioner of its obligations as joint venturer and co-shareholder, then the petitions should fail and should be dismissed. It is the respondents' case that the events complained of by the petitioner that occurred after the making of the shareholders' agreement occurred because of the breach of a fundamental obligation by the petitioner given or undertaken before the

shareholders' agreement was executed. For my part, in deciding this case, I have preferred and adopted the approach taken by Roxburgh J in *Re Harmer*.[9]

The respondents say that prior to the execution of the shareholders' agreement whereby management control of the first respondent was transferred from the relevant respondents to the petitioner, the petitioner had represented and undertaken that in consideration of the change of control aforesaid, the petitioner would inject funds into the first respondent. The petitioner denies that there was such an undertaking. I have to decide whether that denial is credible when viewed against the totality of the circumstances and the probabilities of the case and the undisputed facts.

As I have said earlier, the shareholders' agreement was executed on 18 July 1989. However, prior to the execution of the shareholders' agreement, a memorandum of understanding dated 7 June 1989 was entered into between the petitioner represented by one Mr Ishikawa and the second respondent represented by the third respondent. Under cl 2 of the memorandum of understanding, the third respondent was to immediately transfer his executive functions in the company to one Mr Okazaki who was to manage and control the company's affairs thereafter. On 8 July 1989, there was a handwritten document signed by all the relevant parties, including the third respondent and Mr Okazaki. This document refers to cl 11.2 of the shareholders' agreement which at that time had not yet been executed. This handwritten document provides that the shareholders' agreement shall be valid only for four years but may be extended by the agreement of the parties. By another document dated 18 July 1989 signed by Mr Okazaki and the third respondent, the remuneration and other perks for the third respondent were provided for.

The burning question is: did the petitioner give the alleged assurance or undertaking to the respondents prior to the execution of the shareholders' agreement? The respondents say that the petitioner did and the petitioner denies it. It is common ground that after the petitioner took over control of the company's management, no funds were injected into the company. According to the third respondent, in his affidavit dated 4 November 1991 (encl 42), the petitioner was allowed to take over control of management of the first respondent provided, inter alia, that the fourth and fifth respondents were not removed as directors and that the petitioner will finance the first respondent, expand its business in order to make it profitable and manage the first respondent's business and affairs for a period of four years after which the parties will revert to their original positions. All this is denied by the petitioner.

Taking into account all the circumstances of the case, I find that on a balance of probabilities the petitioner did give the undertaking as stated by the third respondent. One must remember that the second, third and fourth respondents control and controlled the majority shares in the first respondent. As majority shareholders, they also controlled the management of the first respondent prior to the shareholders' agreement which is not out of place in the reality of the commercial world. One does not normally find a minority shareholder controlling the management of a company under a

shareholders' agreement in ordinary circumstances. Something must, therefore, have happened to induce the majority shareholders to hand over control and management to a minority shareholder. The petitioner suggested that the shareholders' agreement was entered into, to quote counsel for the petitioner, 'to formalize the relationship between the parties' coupled with the losses suffered by the first respondent under the management of the third respondent. I do not find these reasons probable.

Thus, if a written shareholders' agreement was necessary to formalize the relationship between the parties, why did the petitioner wait for about five years, ie from 1984, when the company was incorporated, until July 1989 to formalize the relationship? If formalization was so important, I would expect the petitioner to have pressed for the written agreement much earlier. This reason advanced by the petitioner is, therefore, not credible when viewed against the totality of the undisputed evidence, the probabilities of the case and all the circumstances of the case.

As far as the second reason is concerned, if the company was making losses and there was no intention on the part of the petitioner to inject funds into the company, the easiest thing to have done was to have wound up the company to cut all losses. There was, according to the petitioner itself, insufficient funds in the company to embark on an expansion programme. After all, if there were losses, it would have been better for the petitioner to quickly terminate the joint venture so that the losses were not increased. Looking at the petitioner's explanation as a whole very carefully, I find it unacceptable on a balance of probabilities. I find that there was no sincerity or genuineness on the petitioner's part to rescue the company. It is a fair inference from the undisputed facts and I do not find that the alleged losses were only an excuse by the petitioner to take control of the company with a view of ultimately squeezing the respondents out and going to the extent of terminating the company's business life.

As I have said, it is common ground that the petitioner did not inject any moneys into the company after the transfer of power took place. The petitioner says that it did not happen because there was no such undertaking. I have already held that there was and I therefore find that the petitioner acted in breach of its undertaking. Since it was an undertaking that occasioned a transfer of control of the company's management, I find the breach to be a serious matter as the obligation itself was fundamental in nature. In *Re A & BC Chewing Gum Ltd; Topps Chewing Gum Inc v Coakley*,[20] Plowman J held that an entitlement to management participation was so basic that its breach would entitle the grant of relief under the UK equivalent of s 218 of the Act.

Looking at the case as a whole, I find that the petitioner asked to take over control of the company's management for a period of four years during which time it would inject funds, expand its business and put the company on a firm footing. There is no other reason why a minority shareholder should ask for control of the management. To my mind, the parties came to an arrangement whereby at the end of the four years, the status quo ante would be restored subject to the unanimous agreement of all parties to the

shareholders' agreement. On a balance of probabilities, the facts when viewed objectively, to my mind, do not admit of any other reasonable conclusion.

My foregoing conclusions are fortified by the conduct of the petitioner in one other instance. On 27 May 1991 (that is after the oppression petition was presented on 2 May 1991), the petitioner wrote to the third respondent. That letter, which is marked 'Confidential' was signed by one Mr K Torikai, the general manager of the petitioner's South East Asia branch. One of the paragraphs in that letter states as follows:

> With respect to the legal proceedings which have been instituted by Kumagai-Gumi, I expressed to you Kumagai-Gumi's regret that this action had to be instituted and also explained to you that it had been done solely to protect the legitimate interest of Kumagai-Gumi and uphold the spirit and terms of the shareholders' agreement. In view of our mutual acceptance and confirmation that the priority of the shareholders' agreement and its spirit and terms will be respected by all parties, I have instructed our solicitors to withdraw the proceedings as soon as possible.

On 12 June 1991, the third respondent wrote to Mr Torikai of the petitioner, a very long letter on the letterhead of the first respondent. In that letter, he referred to a meeting between himself and Mr Torikai and to certain other matters. I quote only one paragraph from that letter which reads as follows:

> During the meeting of ours, you categorically agreed that the following two matters will be rectified with immediate effect:
>
> (a) to restore my office space as chairman of the company in our Kuala Lumpur office;
> (b) to pay the balance of money owed to Zenecon Pte Ltd of Singapore, amounting to S$113,242.32;
> (c) Kumagai-Gumi shall take immediate action to withdraw the legal proceedings against our company.
>
> Dear Mr Torikai, I am disappointed to note that to date the matter relating to the legal proceeding instituted by you is still pending. This morning I received three letters from your lawyer in Kuala Lumpur advising me that the High Court hearing which was postponed on 23 May will now be adjourned to 28 June 1991, two weeks from today. May I assume that this embarrassing legal proceedings should still proceed after we had agreed not to do so on 23 May?

By a letter dated 21 June 1991, the petitioner responded through Mr Torikai in the following terms:

> I am in receipt of your letter dated 12 June 1991.
>
> As I now understand that you have instructed your solicitors, it would serve no useful purpose in, and I therefore do not propose responding to, your letter, other than to say that I am disappointed to note the manner in which it has been written and the statements and the conclusions made in it.
>
> I must also say that if future negotiations are to take place, which I very much hope they will, to resolve the problems at hand, they must take place on the basis that the concerns of both parties and not just one party are addressed and resolved.

The application to expunge

Both the letters of 12 June 1991 and 21 June 1991 were marked 'Without prejudice'. This, the petitioner contended, made the letters inadmissible and this was part of the basis of its application to strike out contained in encl 45. It is, I think, convenient for me now to give my reasons as to why I dismissed encl 45. In the first place, encl 45 did not identify the precise paragraphs to be struck out. I was being asked to exercise a judicial discretion vested in me by the rules of court. Counsel for the petitioner submitted that the evidence he wished to have struck out related to matters touching and concerning prior negotiations and were therefore excluded by s 92 of the Evidence Act 1950. I have already expressed my views earlier on the extent of the applicability of the extrinsic evidence rule to a case like the present. If I had taken up the suggestion by petitioner's counsel, it would have entailed a hearing of the whole case by way of review of the affidavits and the relevance of the allegedly offending paragraphs to the issue that I had to try. It would have, in my judgment, amounted to a duplication of effort and a complete waste of judicial time.

As regards the petitioner's contention that the without prejudice correspondence ought to be excluded, I am of the view that once there is a concluded agreement, the fact that it was arrived at by an exchange of without prejudice letters is irrelevant. It was so held in *Malayan Banking Bhd v Foo See Moi*.[21]

Taking into account all the circumstances of the case and weighing the rival contentions on a balance, I was more inclined to refuse the application to strike out and to proceed to decide relevance at the hearing proper. I have, out of abundant caution, excluded completely from my consideration, material contained in the affidavits which is not relevant to the issues that I have to decide. I have confined myself to what I perceive to be the relevant evidence upon the issues presented to me by the parties in their pleadings and their submissions.

The agreement to discontinue

I now return to the letters under consideration. In my judgment, these are relevant and admissible. The letters show that an agreement had been reached between the petitioner and the respondents that the oppression petition would be withdrawn. The main reason for the petitioner's refusal to withdraw appears to be the appointment of solicitors by the respondents. I find the attitude of the petitioner to be most unreasonable and unfair. I am unable to comprehend as to how the respondents' appointment of solicitors to protect their interests can be justification for the breach of an agreement to withdraw the oppression petition. This, in my opinion, goes to show that the petitioner is capable of entering into an arrangement and then, for the flimsiest of excuses, to renege from it. To prosecute a petition after having agreed to withdraw it is in my judgment, oppressive and an act of bad faith.

Having regard to all the circumstances of the case, I am satisfied, on a balance of probabilities, that the petitioner is the author of the events and incidents which it complains of as having occurred after the date of the

shareholders' agreement and after the presentation of the petition. In short, the basis on which the petition has been presented is material occasioned by the petitioner's own misconduct. If the petitioner had kept its word and acted in accordance with the undertaking it had given to the respondents, I am certain that the matters complained of would not have occurred.

In my judgment, whether a winding-up order should be made is a matter within the discretion of the court. In *Ebrahimi*,[18] Lord Cross said (at p 387 of the report):

> A petitioner who relies on the 'just and equitable' clause must come to court with clean hands, and if the breakdown in confidence between him and the other parties to the dispute appears to have been due to his misconduct he cannot insist on the company being wound up if they wish it to continue.

Applying this principle, and considering the case as a whole, it is my judgment that the petitioner is not entitled to an order for winding up. In my judgment, the petition for winding up should be dismissed with costs.

Further, taking into account what I have said earlier of the petitioner's conduct and the breach of its undertaking or assurance to the respondents coupled with its conduct in reneging from the agreement to discontinue the oppression petition, I hold that the petitioner has failed to make out a case of oppression. The facts and circumstances of this case, when considered as a whole, leave me in no doubt that it is the petitioner who was the true oppressor. I do not think that any useful purpose will be achieved if I were to deal with each and every one of the items alluded to by the petitioner and the respondents. However, it is necessary for me to deal with two important matters raised by the parties.

The loan agreement

The main thrust of the petitioner's case on the ground of a debt owing to it by the first respondent is based on a loan agreement dated 10 September 1985 which was subsequently revised. The loan agreement declares that the money is being given to the first respondent for the purpose of its business. The petitioner claims that the transaction in question is a genuine loan. The respondents, on the other hand, submit that the real purpose of the purported loan was to enable the petitioner to make an investment in the shares of one Cash Hotel Sdn Bhd.

Bank Negara's approval for a transaction such as this was obviously necessary. Accordingly, the approval of that authority was sought and in a letter dated 27 April 1985, the approval was indeed given. In that letter, Bank Negara, when giving its permission, stated as follows: 'We note that the loan funds will be used to part finance the construction of a hotel complex in Ipoh for Cash Hotel Sdn Bhd at a cost of RM100.2m.'

It is now necessary for me to consider the rival contentions of the parties on the basis of undisputed facts and upon such credible denials which I find.

In the affidavit dated 15 December 1992 and filed in the winding-up petition (which was, as were all other affidavits filed in those proceedings, by consent of the parties used in the oppression petition) the third respondent states as follows:

12.1 Sometime in November 1984, the petitioner, the respondent and one Justera Sdn Bhd (a subsidiary company of Cash Bhd) formed an unincorporated joint venture which joint venture was offered a turn key contract to design and construct a 217 room hotel to be known as the Royal Casuarina Hotel in Ipoh, Perak ('the hotel project'). The hotel project was awarded a negotiated basis. In consideration of the aforesaid joint venture, it was agreed that the respondent would be appointed as main contractor to carry out the turn key contract at a price of 5% below the value of the turn key contract.

12.2 It was also agreed that in consideration of the turn key project being awarded to the joint venture, the petitioner would purchase 18% of the issued share capital of Cash Bhd. Pursuant to this agreement, the petitioner in May 1985 advanced RM6m to the respondent to purchase 18% of the issued and paid-up share capital of Cash Hotel Sdn Bhd on its behalf. As the shares were registered in the name of the respondent, the petitioner induced the respondent to enter into a loan agreement evidencing the movement of RM6m from the petitioner to the respondent. A loan agreement to that effect was signed on 10 September 1985. In truth and in fact, the loan agreement was a sham. In substance, the petitioner had purchased 18% of the issued and paid-up share capital of Cash Hotel Sdn Bhd for RM6m which shares were held and are being held by the respondent in trust for the petitioner. There is therefore no moneys due on account of the aforesaid loan agreement from the respondent to the petitioner.

Further, in the third respondent's affidavit dated 15 December 1992 filed in opposition to the oppression petition, he states as follows:

4.5 The fact that the loan agreement dated 10 September 1985, the revised loan agreement dated 1 November 1988, the second revised loan agreement dated 2 November 1989 and the third revised loan agreement dated 31 November 1990 are sham documents are evidenced by the following matters:

4.5.1 by a letter dated 27 April 1985, Bank Negara Malaysia approved the first respondent's request for foreign borrowings of the first respondent to the extent of RM12m from the petitioner. This included the alleged loan sum. The purpose of the loan in the said approval was stated as 'part finance for the construction of a hotel in Ipoh for Cash Hotel Sdn Bhd'. Both the petitioner and the first respondent knew that it was used for other purposes. In truth and in fact, the petitioner knew that approval from Bank Negara Malaysia to remit funds into Malaysia for the purpose of the petitioner purchasing shares in Cash Hotel Sdn Bhd would have entailed much more information as it would have been an investment in a subsidiary of a public listed company and would have been subject to all other consents from other authorities connected with the approval of such investment;

4.5.2 in truth and in fact, the petitioner agreed to invest in the shares of Cash Hotel Sdn Bhd but because of related formalities the petitioner had those shares registered in the name of the first respondent and induced the first respondent to enter into the loan agreement to evidence the movement of the money from the petitioner to the first respondent.

4.5.3 the minutes dated 29 May 1986 reflect the investment to be consistent with the purpose for which the moneys were brought into the country

given Bank Negara Malaysia's approval. The letter dated 13 October 1988 was written at the request of the petitioner in order that the petitioner may reschedule the alleged repayment terms.

4.5.4 at all material times, it was the petitioner's intention to sell Cash Hotel Sdn Bhd's shares and cause the loan to be repaid in full at an appropriate time. This however could not be done because there were no available buyers at that stage given the then economic climate in Malaysia.

The petitioner's stand is set out in para 6 of the affidavit of Kyoji Machida dated 9 December 1992 wherein he states as follows:

As to paras 4.4, 4.5 and 4.9 of the said affidavit, I would respectfully state:

(i) On 25 July 1984 a joint venture between your petitioner, the second respondent and Justera Sdn Bhd ('the CASH-JV'), tendered for a hotel and office complex. The preparation for the tender commenced in early 1984.

(ii) Under the terms of the joint venture agreement, your petitioner and the second respondent agreed to undertake the design and the execution of the works. Negotiations and tender submissions were handled by the second respondent, through the third and fourth respondents, on behalf of the CASH-JV.

(iii) On 22 August 1984 the CASH-JV was awarded the contract for the construction of the hotel. Subsequently, a contract for the construction of the office complex was also awarded to the CASH-JV. Work commenced on the project in or around September 1984.

(iv) After the commencement of works, the third respondent's proposal for the formation of the first respondent was approved by your petitioner and the first respondent was incorporated on 9 October 1984.

(v) As it was the understanding, as in Singapore, that the second respondent would not take in further works, the works were sub-contracted by the CASH-JV to the first respondent, for a sum which represented 95% of the main contract sum. The guaranteed profit to the CASH-JV was, therefore, 5%. The third respondent, as managing director of the first respondent, estimated that the first respondent would make a profit of 15% on the sub-contract;

(vi) The sub-contract for the whole works was formally awarded to the first respondent in February 1985. The suggestion that, 'in consideration of the joint venture being awarded the contract, the joint venture would award the project to the first respondent at a value of 5% below the contract value' is therefore incorrect. The award was also never a condition of the CASH-JV nor has the contrary been alleged prior to the affirmation of the said affidavit.

(vii) It was never a condition of either the award of the main contract to the CASH-JV or the award of the sub-contract to the first respondent, that the first respondent would purchase any shares of Cash Hotel Sdn Bhd, nor has the contrary been alleged prior to the filing of the said affidavit. The said decision that the first respondent subscribe to the share capital of Cash Hotel Sdn Bhd was a decision made by the third respondent, as managing director of the first respondent after the CASH-JV was awarded the contract, and after the first respondent was awarded the sub-contract, for the project. The third respondent, as managing director of the first respondent, made the decision to acquire 6m shares in Cash Hotel Sdn

Bhd which represents approximately 18.3% of the paid-up capital of Cash Hotel Sdn Bhd solely on the basis that it would be good investment for the first respondent.

(viii) *Your petitioner, at the request of the first respondent through the third respondent, agreed to lend a sum of ¥611,520,000 to the first respondent, to enable the first respondent to acquire 6m shares in Cash Hotel Sdn Bhd,* on the terms and conditions evidenced in an agreement dated 10 September 1985 made between the first respondent and your petitioner. Your petitioner has never agreed, and there was never any understanding or agreement between your petitioner and the first respondent, that the first respondent would purchase any shares, whether in Cash Hotel Sdn Bhd or otherwise, on behalf of your petitioner, nor has the contrary been alleged prior to the affirmation of the said affidavit.

(ix) The project was abandoned, after completion of the hotel in or around December 1985, as Cash Hotel Sdn Bhd were unable to meet their financial obligations in respect thereof. Cash Hotel Sdn Bhd are presently in receivership as a result of the appointment of receivers by the debenture holders.

(x) The CASH-JV has until to date not been paid the sum of approximately RM5.7m, being the sum due and outstanding from Cash Hotel Sdn Bhd to it under the main contract for work done, which sum is unsecured. The first respondent has also until to date not been paid the sum of RM4.785m being the sum outstanding from the CASH-JV to it under the sub-contract for work done. This project has, therefore, been a net loss for both the CASH-JV and the first respondent and the investment of the first respondent in the shares of Cash Hotel Sdn Bhd has also been a net loss to the first respondent. (Emphasis added.)

Machida, in his aforesaid affidavit, has produced the minutes of the second directors meeting of the first respondent held on 29 May 1986. That meeting was chaired by the third respondent. Also present at that meeting were Mr Machida, one Mr Yorio Nakazato, one Mr T Omiya (all representing the petitioner's interests in the first respondent) and the fourth and fifth respondents. In para (B) under the heading 'Minutes of previous meeting', the following passage appears:

> Investment
>
> ZK had invested RM6m in Cash Hotel Sdn Bhd and a loan agreement equivalent to RM6m in Yen had been signed. Loan repayment would commence on 4 June 1988 in three equal instalments over a period of ten months by 4 June 1989.

An Extraordinary General Meeting of the first respondent was held on 6 March 1991 where all relevant parties were present. The minutes of that meeting show a discussion on the sale of the shares in Cash Hotel Sdn Bhd. I reproduce below the relevant part of that minute.

> 3.1 Sale of shares
>
> Mr Shungo Okazaki informed the members present that he received a letter from MCB Holdings Bhd confirming that they have offer to buy all the shares in Cash Hotel Sdn Bhd for a total consideration of RM41m consisting of shares and cash. However, Mr Yoshio Ichijo confirmed that at a board meeting of Cash Hotel Sdn Bhd, the minutes of which he would forward to the secretary, it was confirmed that the offer was meant to be that the Cash

Hotel Sdn Bhd was to be free of encumbrances, ie all the liabilities were to be met from the RM41m proceeds of sale of shares. The chairman replied that the letter of offer is vague and differs from what Mr Yoshio Ichijo had just said and the meeting therefore decided to defer the decision on the sale pending further clarification as regards the terms.

Mr Cheah informed the meeting that he had already written a letter of acceptance on the share offer. The meeting directed that Mr Shungo Okazaki was to instruct the lawyers to write to withdraw that acceptance letter stating that Mr Cheah did not write with the authority of the members of the company.

I have considered all the relevant evidence, including the contemporary documents and the conduct of the parties. Having done so, I find that the petitioner's statement that it was the third respondent who made the decision to invest in Cash Hotel Sdn Bhd is not credible. I have tested that allegation against all the evidence and against the probabilities of the case. If it was indeed an investment made on the volition of the third respondent alone, I find it surprising, to say the least, that such a stand was not taken by the petitioner at any of the meetings I have referred to. I find that the true position was that both the petitioner and the first respondent had misled Bank Negara by giving false and misleading information as to the purpose of the loan. Machida, in para 6(viii) of his affidavit which I have quoted above, admitted that the real purpose of the loan was to enable the first respondent to acquire shares in Cash Hotel Sdn Bhd.

It follows that the loan was not for the purpose declared in the agreement or to Bank Negara. Bank Negara was no doubt misled to enable the parties to bring in the money from Japan for the real purpose of purchasing shares in Cash Hotel Sdn Bhd. No one can say how Bank Negara would have reacted if the true position had been disclosed to it. Suffice that misleading a public authority, such as Bank Negara, is a serious matter and I view it as such.

Moreover, the petitioner does not, by its conduct, appear to have acted as an indignant lender.

In fact, its conduct is consistent with that of an investor trying to recover its investment. The minutes of the EGM held on 6 March 1991 confirm this view. If the petitioner had already lent the money for the purpose declared in the loan agreement and to Bank Negara, then one would not expect it to act as if it were an investor attempting to recover its investment.

Based on well-established authorities, the parties should not be entitled to have the benefit of any transaction by which a public authority has been misled. In *Suntoso Jacob v Kong Miao Ming & Anor*,[22] the Singapore High Court refused to enforce a transaction whereby a public authority had been misled. In that case, the plaintiff, an Indonesian national, sought a declaration that the first defendant was holding shares in a company upon trust for him. At the material time, there had been issued an administrative guideline by the Registrar of Singapore Ships that a vessel would not be accepted for registration unless the corporate owner was itself owned as to at least one-half of its equity by Singapore citizens. The plaintiff was aware of this requirement. The plaintiff admitted that the true ownership of the shares in the company owning the vessel that had been registered had to be kept

away from the Registrar. In dismissing the plaintiff's claim, Lai Kew Chai J said (at p 97 of the report):

> The plaintiff is therefore confronted with the principle stated a long time ago by Lord Mansfield: 'No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act.': see *Holman v Johnson* (1775) 1 Cowper 341; [1775-1802] All ER Rep 98. A similar situation had arisen in *Palaniappa Chettiar v Arunasalam Chettiar* [1962] MLJ 143. I have no doubt that the plaintiff had practised a deception on the Registrar of Singapore Ships. To the plaintiff, I have to say: 'Let the said shares lie where they fall'.

In the instant case, the parties obviously knew that Bank Negara's permission was necessary in order to bring the money from Japan into Malaysia. They must have known that Bank Negara must be told the whole truth as to the true purpose of the transaction. The fact that they did not do so must result in the consequence that the transaction should not be allowed to stand or be enforced (see also *Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd*[23] and *Nasib Singh v Ramasamy*[24]).

The Wamaju transaction

Much of the facts relating to this matter are undisputed and are to be gathered from the contemporaneous documents and the various affidavits filed in both the winding-up and the oppression petitions. What is in serious dispute between the parties is the inferences that are to be drawn from the evidence.

It is not disputed that in 1988, the first respondent subscribed and took up 70% of the issued and paid-up share capital of a company known as Wamaju Holdings Sdn Bhd ('Wamaju'). The remaining 30% is owned by one CK Tan. Wamaju was formed to develop a project known as Kingfisher Park at Kota Kinabalu. The project was to be carried out under a joint venture between the first respondent and the petitioner.

In his affidavit dated 15 December 1992 (filed in the winding-up petition), the third respondent had alleged that the petitioner was responsible for the management of the affairs of Wamaju. Mr Yoshio Ichijo, in his affidavit dated 16 March 1993 filed in the winding-up petition, has denied that *he* was responsible for the management of Wamaju. He says it was Mr Machida who was on the board of Wamaju. There is no specific denial of the statement made by the third respondent that the affairs of Wamaju were in fact being managed by the petitioner through its nominated directors. However, Mr Ichijo, in para 4 of his affidavit dated 14 January 1992, denied that the petitioner was responsible for the management of Wamaju. Counsel for the petitioner has referred me to the minutes of the board meeting held on 5 March 1990 to support the contention that one Mr CK the person who was responsible for the management of Wamaju. I have read these minutes very carefully and I find that there is a reference in them to Mr Mizuma being recalled from Kota Kinabalu to head a project in Penang. The minutes that have been produced are those of the company and not the minutes of Wamaju's board.

I have also had the opportunity of perusing the joint venture agreement between the petitioner and the first respondent company dated 29 January 1989 which has been produced as exh AG–8 under Mr Ichijo's affidavit dated 14 January 1992 and upon which counsel for the petitioner placed great reliance in his submission. Counsel contended that this agreement clearly showed that the petitioner was not in management of Wamaju. I think counsel has missed the point. That joint venture agreement provided for the establishment of a management board to conduct the joint venture and had nothing whatsoever to do with the board of directors of Wamaju.

I have considered most carefully the denial by Mr Ichijo that the petitioner was not in management of Wamaju and tested it against the totality of the evidence and the probabilities of the case. Having done so, I find that it is not a credible denial.

Under the shareholders' agreement, Wamaju had been described as a subsidiary of the company in Sch 1 of that agreement. The parties agreed that the shareholders' agreement had the effect of transferring management of the company to the petitioner. Clause 6.2 of the shareholders' agreement requires all cheques for payment by the company and its subsidiaries to be signed by a nominee of the petitioner and a nominee of the second respondent. The obvious intention of the parties was to vest management of the company and its subsidiaries in the hands of the petitioner and in particular its nominee, Mr Shungo Okazaki (See cl 6.1 of the shareholders' agreement).

Secondly, in the debenture issued by Wamaju to the petitioner, Wamaju was required to have a designated account which was defined as:

> ... an account current with a branch of a bank ... which Kumagai (the petitioner) shall, from time to time, designate in writing and the mandate and conditions for the operation for which will require the signature of the Kumagai representative, either alone or in conjunction with others, on all occasions.

This shows that the finances of Wamaju were very much under the control of the petitioner.

It is also not disputed that the projected profit of the Wamaju project was RM36.418m. According to Mr Ichijo, there were several downward revisions to the projection. By early 1991, the projections showed a loss of RM6.205m in respect of Phase 1A1 of the project. In my judgment, nothing much turns on this aspect. The management of Wamaju being in the hands of the petitioner, it is a question whether it conducted that management prudently, and I am not required to answer that question here. It is the other circumstances surrounding the Wamaju transaction that have been called into question.

It is common ground that Wamaju had certain banking facilities granted to it by Citibank NA to enable it to carry out the development of Kingfisher Park. On 19 August 1989, Wamaju created a debenture in favour of the petitioner who had given a guarantee to Citibank NA in respect of the facilities granted to Wamaju. Without informing the first respondent (which was its co-joint venturer) or consulting any of the other respondents, the petitioner terminated the guarantee given by it to Citibank NA. According

to the petitioner (as revealed in Ichijo's affidavit dated 16 March 1993), Wamaju had acted in default of the terms of the debenture given by it to the petitioner and it was for that reason that the petitioner terminated the guarantee. However, the petitioner has not condescended to any particulars of default by Wamaju. A

The stand taken by the petitioner appears to be more than a little strange to me because it was the petitioner who was managing Wamaju. If Wamaju was in default of the terms of the debenture, can the petitioner, who was in the conduct of Wamaju's affairs and who must therefore be responsible for the default, in all conscience, complain or rely upon the default? In my judgment, that question must be answered in the negative. To do otherwise would be to permit a party to take advantage of its own wrong. B C

In any event, even if I am wrong in my finding that Wamaju's affairs were not being managed by the petitioner, there is the other matter, namely, the question of Wamaju's alleged default. As I have said earlier in this judgment, the petitioner has not said in what way Wamaju was in default. The allegation of default is therefore vague and unsubstantiated. Neither has the petitioner adduced any evidence to show that Wamaju was given notice of the alleged defaults and asked to rectify them before the petitioner took steps to terminate the corporate guarantee. D

Viewed from either of these positions, the petitioner's stand is unsustainable. In my judgment, there is much force in the respondent's contention that the petitioner acted in bad faith and lacked frankness and candour in the way in which it acted in respect of the Wamaju affair. I also find that the petitioner acted in secrecy and without frankness in terminating its corporate guarantee. The petitioner did not consult with the second respondent or discuss the matter with the second respondent, who is its fellow joint venturer and to whom it owes the duty of utmost good faith, before it took action to terminate the guarantee. Instead, the petitioner merely wrote a letter to Wamaju on 21 November 1991 stating that Citibank NA had asked it (the petitioner) to settle the outstanding facility of about RM6m and demanded payment of that sum from Wamaju. There is nothing in that letter to indicate that it was the petitioner's act that had resulted in Citibank NA making the demand. E F G

It was only through Citibank NA's letter of 20 November 1991 that it became clear that the real reason for Citibank NA's demand on Wamaju was caused by the petitioner's purported termination of the guarantee. By this letter, Citibank NA requested Wamaju to liquidate the RM6,040,885.24 outstanding overdraft loan with interest within two weeks from the date of the letter. On 25 November 1991, the petitioner, on its own volition, paid off Citibank NA. The petitioner's liability to Citibank NA had not arisen as at that date. Consequently, the petitioner improved its position in order to enable it to exercise its powers under the debenture to appoint receivers and managers which it did on 29 November 1991. H

Further, by acting as it did, the petitioner also improved its position under the Companies Act 1965. As a guarantor, the petitioner was at best a contingent or prospective creditor in law and although it would, under s 217(1) of the Act, be entitled to present a winding-up petition, such a I

petition would have been subject to the provisions of s 217(2)(c) of the Act which would have placed an additional obstacle in the path of the petitioner's chosen course. The petitioner converted itself of its own volition, in circumstances that does it no credit as a fiduciary, from a contingent or prospective creditor to a creditor possessing an unqualified right under s 217(1).

As at that date, that is to say, the date of termination of the guarantee by the petitioner, the oppression petition was already pending and the agreement to withdraw it had already been breached. The injunction granted by VC George J had bound the respondents hand and foot. It is therefore important to bear in mind that the events surrounding the Wamaju affair, which I have set out earlier in this judgment, occurred at a time when the parties were already in bitter dispute.

Counsel for the petitioner attempted to explain away the petitioner's conduct in relation to Wamaju as being entirely proper, normal, consistent with accepted commercial and corporate practice and reasonable in the circumstances and therefore as being an entirely innocent exercise. Looking at the evidence as a whole, I cannot accept this. It is plain that after June 1991 (ie, after the breach of the agreement to withdraw the oppression petition took place), the petitioner intentionally proceeded upon a course designed to cause harm to the second respondent's interests as a shareholder in the first respondent and the Wamaju affair is merely an illustration of that fact.

After Wamaju was placed under receivership by the petitioner, the receivers and managers substituted the original agreement between Wamaju and the Sabah Economic Development Corporation dated 27 May 1988 with a new agreement entered into in June 1992. This resulted in the termination of the turn key contract which the joint venture (between the petitioner and the first respondent) had secured for the development of the Kingfisher Park project. (See p 85 of exh LHK–1 produced under the affidavit of the third respondent filed in the winding-up petition). The actions of the petitioner therefore had two consequences. Firstly, it resulted in the first respondent's investment in Wamaju being placed in jeopardy. The second was the loss to the first respondent of the benefit of its share under the turn key contract.

The facts and circumstances show that the petitioner wrote to Wamaju alleging that Citibank NA had made a demand on it pursuant to the guarantee thereby creating an impression that it was obliged to make payment without mentioning one word of any default by Wamaju itself. The facts and circumstances also show that the petitioner proceeded to appoint receivers and managers under the debenture issued by Wamaju. The respondents had in fact written to the petitioner and the receivers challenging what had been done. Apparently, all that they said fell upon deaf ears. In my judgment, the petitioner's conduct, when viewed as a whole, amounts to oppression.

I find support for my conclusions from the judgment of Olney J in *Re East West Promotions Pty Ltd*[25] at p 89 where he said:

> The secretive manner in which the respondent conducted herself, her lack of frankness when confronted by the petitioner and her continued failure to account for the company's assets or the proceeds that she has derived therefrom leave me in no doubt that affairs of the company have been conducted by her in a manner that is oppressive and unfairly prejudicial to the petitioner and, that being so, it is my view that this is a proper case for the exercise of the court's jurisdiction to make an appropriate order.

The foregoing passage illustrates that lack of candour or frankness may, in certain circumstances, constitute oppression. Similarly, in the case before me, as I have already said, the petitioner acted without frankness or candour. In the particular circumstances of the present case, it is, as I have observed, such conduct does constitute oppression.

Cross-petition

The respondents have, in two of their affidavits dated 4 November 1991 and 17 March 1993, cross-petitioned for relief under s 181 against the petitioner. The petitioner objects to such a course and has submitted that there is no provision for cross-petition contained in the Rules of the High Court 1980 ('the RHC').

The procedure for bringing an application under s 181 has been prescribed by O 88 r 5(h) of the RHC. That rule of court requires that such an application must be made by petition.

I agree with counsel for the petitioner that the RHC do not contain any specific provisions for the presentation or prosecution of a cross-petition, such as those to be found in the Divorce and Matrimonial Proceedings Rules 1980.

However, O 92 r 4 of the RHC provides as follows:

> For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

From my own research into this area of the law, I find that O 92 r 4 is drawn from s 151 of the Civil Procedure Code which governed adjectival law prior to the coming into force of the Rules of the Supreme Court 1957. That section was itself in identical terms with s 151 of the Indian Civil Procedure Code. I think it will be useful if I reproduce s 151 of our old Civil Procedure Code in order to make a comparison between it and O 92 r 4. That section read as follows:

> Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

It can be seen that s 151 and O 92 r 4 are almost identical in terms.

In *Nainsingh v Koonwarjee*,[26] the Indian Supreme Court held that s 151 of the Indian Civil Procedure Code cannot be used where a party has an alternative remedy provided in the Code. Indian cases interpreting s 151 have also held that the section does not create substantive rights but only

governs procedure: *Sarwan v Amar.*[27] The Indian Supreme Court has also held that s 151 cannot be relied upon to nullify a statutory provision: *Cotton Corp v United Industrial Bank Ltd.*[28] My reading of the Indian Supreme Court decisions on s 151 (all of which are to be found noted in the *AIR Manual Commentary* (5th Ed)) leave me in no doubt that the section is to be resorted only when there is no specific procedural provision in the Code.

In *Pacific Centre Sdn Bhd v United Engineers,*[29] Edgar Joseph Jr J relied, inter alia, on O 92 r 4 to sustain the jurisdiction to grant a Mareva injunction.

In *Lee Lee Cheng v Seow Peng Kwang,*[30] the Malayan Court of Appeal explained the width of s 151 of our former Civil Procedure Code in the context of limitation provisions.

In *Permodalan MBf Sdn Bhd v Tan Sri Datuk Seri Hamzah bin Abu Samah & Ors,*[31] the Supreme Court considered the ambit of the court's inherent jurisdiction. After setting out O 92 r 4, Syed Agil Barakbah SCJ observed: 'It follows that where the rules contain provisions making available sufficient remedies, the court will not invoke its inherent powers.'

In my judgment, the corollary of the principle stated by Syed Agil Barakbah SCJ is that the court will invoke its inherent powers where the rules do not contain provisions making available sufficient remedies.

Having considered this matter very carefully, I am satisfied that the absence of a specific provision enabling the presentation of a cross-petition does not prohibit this court from entertaining such an application. There is nothing in the RHC prohibiting the presentation of a cross-petition. As was observed in one of the Indian Supreme Court cases, a code of civil procedure cannot foresee and provide for every eventuality. Where it does not, O 92 r 4 may be invoked to prevent injustice.

In this case, for instance, if I were to agree with counsel for the petitioner and require a separate originating petition by the respondent before I am prepared to act, it would entail a duplication of all the evidence and a multiplicity of originating processes to determine a single dispute. In my judgment, it is necessary to prevent injustice in this case by permitting the admission of the cross-petition formulated by the respondents. For these reasons, the procedural objection raised by the petitioner fails.

I have already set out earlier in this judgment my findings on the question of oppression. Having found that the petitioner is the real oppressor, it is necessary for me to consider what relief ought to be granted to the respondents.

In my judgment, the relationship which is essential for shareholders to work with each other in an acceptable corporate atmosphere was adversely affected when the petitioner jettisoned its undertaking to the respondents which was the fundamental basis on which both the shareholders' agreement and the memorandum of understanding rested. The foundation having been destroyed, I find little or no point in the shambles that remain in the form of the paper writings. I am therefore of the opinion that with a view of bringing an end to the matters complained of, both the shareholders' agreement and the memorandum of understanding should be cancelled.

It follows from what I have said that the management of the first respondent can no longer be conducted on the basis of representation by the nominated directors of the petitioner and the second respondent. I am of the opinion that in order to remedy the matters complained of, management of the first respondent should be vested in the second respondent through its nominated directors, namely, the third, fourth and fifth respondents. In order to give effect to this, it is necessary that the petitioner's nominated directors should be removed from the board of the company so that it can function. As matters now stand, it is common ground that the company is unable to function because of the disputes between the parties and this is a wholly unsatisfactory position which must be remedied.

I have already held the loan agreement to be unenforceable. There is, therefore, no real purpose served in that document surviving. Consequently, in exercise of my powers under s 181(2), I think that the proper order that I should make is to also cancel that transaction.

Since I have found that the petitioner is the real oppressor, I think that the matters complained of may be remedied by the making of a compulsory purchase order in respect of the petitioner's shares. Since the petitioner is the cause of the breakdown in the corporate relationship between the parties, I do not see any real purpose in allowing them to continue or remain as shareholders. Accordingly, in my judgment, the proper order that I should make here should be an order directing the petitioner to sell to the second, third and fourth respondents and for these respondents to purchase the petitioner's shares at a price which shall be determined on an inquiry to be conducted before me.

It is for the reasons I have given in this judgment that I made the following orders on 12 October 1993:

(1) the petitioner's claim for relief under s 181 under Petition No D3–26–13–91 is dismissed;
(2) the Winding-Up Petition No D6–28–94–92 is also dismissed;
(3) on the cross-petition of the second, third and fourth respondents, I make the following orders under s 181 with a view to bringing to an end or remedying the complaints before me:

    (i) the loan agreement dated 10 September 1985 entered into between the petitioner and the first respondent is hereby cancelled;
    (ii) the memorandum of understanding dated 9 June 1989 entered into between the petitioner and the second respondent is hereby cancelled;
    (iii) the shareholders' agreement dated 18 July 1989 entered into between the petitioner of the one part and the second, third and fourth respondents of the other part is hereby cancelled;
    (iv) Yoshio Ichijo, Tomohiro Omiya, Kyosuke Mizuma and Shungo Okazaki are hereby removed as directors of the first respondent;
    (v) the petitioner is hereby directed to sell to the second, third and fourth respondents and these respondents are hereby directed to purchase all the petitioner's shares in the first respondent at a

price to be determined at an inquiry to be conducted before me on a date to be fixed;

(vi) the petitioner is hereby ordered to pay compensation to the second, third and fourth respondents for the loss sustained by these respondents. The amount of such compensation shall be determined at an inquiry to be conducted before me on a date to be fixed;

(vii) the costs of both petitions are to be paid by the petitioner to the respondents;

(viii) the parties are at liberty to apply.

In view of my dismissal of the oppression petition, the injunction granted by VC George J on 2 May 1991 automatically falls to the ground.

Order accordingly.

Reported by Jeanne Tan